No. 80-801

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSUMERS UNION OF UNITED STATES, INC. and EDWARD J. GORIN,

Appellants,

v.

MURIEL SIEBERT, Superintendent of Banks of the State of New York,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

APPELLANTS' OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

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The motion to dismiss or affirm was brought in support of a three-judge district court decision which upheld the constitutionality of New York Banking Law § 268 against a challenge under the Privileges and Immunities Clause, Art. IV, §2, and the Commerce Clause, Art. I, § 4, cl. 8, of the U.S. Constitution.[1] Section 268 restricts the sale of savings bank life insurance to those who reside or regularly work in New York. The district court held that the right

[1] Appellee contends that the Commerce Clause claim is not properly before the Court. Motion to Dismiss or Affirm at 10 ("Motion at ___"). However, the remand order merely ordered further consideration in light of *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978). It did not reject any of appellants' claims.

to free access to New York's insurance market is not a fundamental right as defined in *Baldwin* v. *Fish & Game Commission of Montana,* 436 U.S. 371 (1978), primarily because New York "created" SBLI as a "non-state subsidized, social welfare program." App. 15a.[2] The district court reasoned that this approach was comparable to State participation in the life insurance market, and, therefore, the discrimination was justified under *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794 (1976) and *Reeves, Inc.* v. *Stake,* 100 S.Ct. 2271 (1980). App. 16a-19a.

The dispute centers around the characterization of the legislative scheme which authorizes savings banks to sell life insurance. In appellants' view, SBLI is an article in commerce, and § 268 is a discriminatory state business regulation. In the view of the district court and the appellee, SBLI was "created" by New York and, therefore, New York is entitled to discriminate against nonresidents.[3] This Court is asked for the first time to define when a State enters a market in order to come within *Alexandria Scrap* and *Reeves.*

The dispute touches upon the multi-billion dollar market for life insurance. Left intact, many millions of consumers will be denied the choice of an excellent insurance policy and also denied the benefits of competition which SBLI could create.

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[2]"App. _____" refers to the district court opinion set forth in the Appendix to the Jurisdictional Statement.

[3]In its motion, appellee attempts to obtain Louis D. Brandeis' personal endorsement for its position by suggesting that the geographical limitation was contained in Brandeis' original proposal. Motion at 5. However, the legislative history simply does not reveal when or why the limitation was included in the statute. Appellee's statement is mere speculation. Further, in a letter of June 5, 1928, to Charles H. Jones, Brandeis strongly opposed limitations on the sale of SBLI. Pltfs. Exh. 10; Joint Appendix at 116. The Joint Appendix is part of the district court record.

The Court should, therefore, order plenary consideration of this case to reverse the erroneous decision of the district court and to resolve this important issue of law.

1. Section 268 Violates A Fundamental Right of Nonresident Consumers

In *Baldwin,* this Court did not enumerate all rights which were to be considered basic under the Privileges and Immunities Clause, but said that "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." 436 U.S. at 383. In explaining the decision, the Chief Justice said in his concurrence that, "The Clause assures non-resident citizens the opportunity to purchase goods and services on the same basis as citizens. . ." *Id.* at 394. This same fundamental right was specifically enumerated by the Court using somewhat different language in earlier cases. See Jurisdictional Statement at 10-11. In appellants' view, this right is offended by the geographical limitation on the sale of savings bank life insurance.

In its motion, appellee seeks to distinguish the present case by saying, "Even if an interest or activity has a colorable 'basic' dimension, it is excluded from the Clause if it derives solely from the relationship between residents, or citizens, and their state. *Snowden* v. *Hughes,* 321 U.S. 1, 6-7 (1944)." Motion at 14. However, *Snowden* is a case arising under the Privileges and Immunities Clause of the Fourteenth Amendment which protects the rights of national citizenship. The Court said that rights granted by state statutes do not fall within the rights of national citizenship. *Ibid.* The principle is not applicable to the Article IV Privileges and Immunities Clause which is designed to assure that States grant nonresidents the same basic rights granted to residents by state law. E.g., *Hicklin* v. *Orbeck,* 437 U.S. 518, 524 (1978). In other words, appellee's proposed exception would consume the rule and must be rejected.

Appellee next argues, citing dicta in *Paul* v. *Virginia,* 8 Wall. 168, 180-181 (1868), that the Privileges and Immunities Clause is not designed to give state laws effect in other States. Motion at 14. However, appellants are merely seeking to give nonresidents who come to New York the same access to savings bank life insurance as residents have. Mr. Gorin, for instance, walked into a New York savings bank and was denied the opportunity to purchase the bank's life insurance. Stip. ¶ 4.[4] Appellee's argument is inapplicable to this case.

Since the Articles of Confederation, the Court has found that nonresidents have a fundamental right to "all the privileges of trade and commerce" for the purpose of "forming a more perfect Union." *Austin* v. *New Hampshire,* 420 U.S. 656, 660-661 (1975). Interstate commerce has been one of the primary means of fusing the Nation into a single entity. *Hughes* v. *Oklahoma,* 441 U.S. 322, 325-326 (1979). The underlying principle was set forth in *H.P. Hood & Sons, Inc.* v. *Dumond,* 336 U.S. 525, 539 (1949), when the Court said:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. *Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation.* Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. (emphasis added)

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[4]"Stip." refers to the Stipulation on Remand filed in the district court.

This basic policy has never been limited to employment opportunities as suggested by appellee's statement that, "Appellants do not suggest why the purchase of SBLI is comparable to earning a livelihood." Motion at 15. In enforcing the policy under the Privileges and Immunities Clause, this Court has applied it broadly to all regulations affecting trade and commerce. The Court has required not only equal access to jobs, *Hicklin* v. *Orbeck,* 437 U.S. 518 (1978), but also equal access to natural resources for commercial use, *Toomer* v. *Witsell,* 334 U.S. 385 (1948), equal access to medical services, *Doe* v. *Bolton,* 410 U.S. 179 (1973), and equal rights to an insolvent debtor's assets, *Blake* v. *McClung,* 172 U.S. 239 (1898). In the areas of nonresidents taxes and fees, the Court has only permitted discrimination to equalize the benefits and burdens of state-funded activities and services. In effect, nonresident payments are designed to avoid discrimination against residents. E.g., compare, *Travellers' Insurance Co.* v. *Connecticut,* 185 U.S. 364 (1902) with *Austin* v. *New Hampshire,* 420 U.S. 656 (1975) (commuter taxes). The right of nonresident consumers to equal access to New York's insurance market is perfectly comparable to these previously enumerated rights.

While *Baldwin* arguably involved a form of commerce, it was not a departure from this principle. The Court found that the luxury sport of elk hunting was enjoyed by a few wealthy sportsmen. Rather than endorsing discrimination against nonresidents, the Court found that the higher nonresident fee hindered few, if any, from hunting while providing funds to protect the herd for the good of all. In other words, no significant discrimination was found by the Court.

By contrast, the discrimination created by § 268 is real and substantial. Life insurance is purchased by 86 percent of American families from the richest to the poorest. The

geographical limitation in § 268 is a total bar to the purchase of a life insurance product which ranks 70th in insurance in force among the 1800 insurers in the United States, despite its limited market. New York consumers have declared SBLI to be an excellent insurance product through their purchases. See Jurisdictional Statement at 11.

Thus, appellee's motion is in error when it argues that § 268 does not violate a fundamental right.

2. New York Has Not Entered The Life Insurance Market

In further support of their view that § 268 does not fall within the Privileges and Immunities Clause, the district court and appellee place great reliance upon *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and *Reeves, Inc.* v. *Stake,* 100 S.Ct. 2271 (1980). In these cases, the States became participants in markets for automobile hulks and cement, respectively. In explaining this reliance, appellee says, " . . . it is evident that the 'goods and services' to which the Chief Justice referred were those in private trade or commerce, and not those which were the result of governmental welfare or proprietary programs." Motion at 16. The appellee goes on to assert that, "New York SBLI is a social welfare program and entitled to the same deference from federally imposed constraints as any other state-created public benefit, or assistance, program." Motion at 17. And finally, appellee concludes that, "A state need not pay public funds to become a 'market participant,' . . . , it need only create the enterprise." Motion at 18.

Appellee's argument seeks to greatly expand the Commerce Clause exception set forth in *Alexandria Scrap* and *Reeves* while at the same time mischaracterizing the nature of New York's interest in savings bank life insurance.

Contrary to appellee's assertion, the principle set forth in these cases does require an investment from the state treasury. In *Reeves,* this Court said.

> The State's refusal to sell to buyers other than South Dakotans is 'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve.

100 S.Ct. at 2280. When state taxpayers invest their own funds in an enterprise, this Court found that they bear the risk of loss and are entitled to benefits of the enterprise. Thus, a State does not become a market participant by "creating" the enterprise as suggested by appellee. Even the district court recognized that New York was not a market participant. The district court said:

> For the purposes for which this court relies on *Reeves,* we need not reach the question of whether the State of New York became a "participant" in the industrial life insurance market by merely creating, and not itself purchasing or selling, a form of insurance. We note, however, that SBLI, by providing an alternative to commercial life insurance, both responded to a public need and altered market patterns in the industry.

App. 17a, n.17. However, in *Reeves* this Court made it clear that the distinction between a market participant and a market regulator is the heart of the analysis. 100 S.Ct. at 2277. Therefore, the district court's analysis is faulty.

Since New York was regulating the insurance market by authorizing savings banks to sell life insurance, the district court and appellee's reliance upon *Reeves* and *Alexandria Scrap* is misplaced. New York has invested no funds in the SBLI system. Banking Law § 270 specifically prohibits the

use of state funds to support the SBLI system. The district court found that the system is "non-state subsidized." App. 15a. Banking Law § 263 states that the savings banks, "may conduct the business of life insurance and grant or sell annuities with all the rights, powers, and privileges and subject to all the duties, liabilities and restrictions relating to domestic legal reserve life insurance companies conferred or imposed by the insurance law. . . ." The insurance contracts are entered into by the savings banks and the insured. The State is not a party to the contract. The investment is made by the savings banks, the risk taken by the savings banks and the profits, if any, are retained by the savings banks and are taxed by the state. See Jurisdictional Statement at 12-13.

3. Section 268 Does Not Advance Any State Interest

Since the geographical limitation is a business regulation, it can only survive if it meets the test set forth in *Hicklin* v. *Orbeck,* 437 U.S. at 525-526. Nonresidents must constitute a "peculiar source of the evil at which the [discriminatory] statute is aimed," and there must be a "reasonable relationship" between the danger and the discrimination. *Ibid.* The State has the burden to meet this test, *Hughes* v. *Oklahoma,* 441 U.S. 322, 326 (1979) and has failed to do so.

According to appellee, "New York's SBLI program has a two fold purpose: to provide individuals of modest income with an alternative to industrial insurance, thereby enhancing their economic security in the manner that Brandeis believed would be most effective; and to minimize the risk to the state and local treasuries that would be required to pay public assistance to individuals who were willing to assume financial responsibility for themselves but were unable to do so because sound,

reasonably priced insurance was not readily available to them." Motion at 6. The geographical limitation does not advance either of these purposes, and the elimination of this limitation will not hinder either purpose.

The district court found that SBLI is created in a "condition of plentitude." App. 18a. In other words, there is no limit on the amount of life insurance that the savings bank can sell. Thus, to the extent, SBLI provides New Yorkers of modest means with an alternative to industrial insurance, that alternative will still exist even if nonresidents can purchase SBLI. The record contains no suggestion that increased sales to nonresidents will affect that alternative. If anything, the expanded risk base should make the entire system safer.

Similarly, to the extent SBLI serves to minimize public assistance,[5] it will continue to serve that function by permitting nonresidents to purchase SBLI. New York would be providing benefits to nonresidents without disadvantaging residents or draining the state treasury.

Appellee also argued that § 268 does not infringe upon the Privileges and Immunities Clause because, "New York's enactment of SBLI does not preclude any other state from enacting the same program." Motion at 19. This argument was specifically rejected by this Court in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). See Jurisdictional Statement at 14-15.

In a related argument, appellee contends that nonresidents are not disadvantaged because they have other life insurance choices. Motion at 19. However, the right to choose is a fundamental right of the individual. Also, as noted above, while other life insurance policies may have the same terms and conditions, SBLI is

[5]The record contains no evidence to suggest that SBLI actually is reducing public assistance.

"remarkably low cost" and chosen by a remarkably high percentage of New Yorkers who have the freedom to choose. See Jurisdictional Statement at 3-4, 11.

Finally, appellee contends that New York's only interest is in its residents. However, New York's interest arises from the benefits to the Nation of interstate commerce. Further, New York has no interest in excluding nonresidents from purchasing SBLI. It costs the state treasury nothing to open sales to all, and in fact, it may cost the State tax revenues to exclude nonresidents. This argument cannot be a "valid independent reason" for the severe discrimination caused by the geographical limitation.

CONCLUSION

The foregoing considered, the Court should note probable jurisdiction and set this case for full brief and argument.

Respectfully submitted,

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